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No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1938

UTAH FUEL COMPANY, ET AL., PETITIONERS

v.

NATIONAL BITUMINOUS COAL COMMISSION, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL BITUMINOUS COAL COMMISSION IN OPPOSITION

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OPINIONS BELOW

No opinion was entered by the District Court. The opinion of the United States Court of Appeals for the District of Columbia, filed December 5, 1938, has not yet been reported.

JURISDICTION

The decree of the Court below was entered December 5, 1938. The petition for a writ of certiorari was filed December 16, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. May the National Bituminous Coal Commission introduce into evidence at price hearings held by it cost reports filed with its statistical bureaus by coal producers, pursuant to Commission Order No. 15, entered July 15, 1937, or are such reports confidential?

2. Is an order of the Commission directing its Secretary to permit parties to the cost hearings to inspect the cost reports subject to review in a court of equity?

3. Does the complaint herein contain sufficient allegations of irreparable injury?

STATUTE INVOLVED

The provisions of the Bituminous Coal Act of 1937 (50 Stat. 72–90, 15 U. S. C., § 828–851), primarily involved are Section 4–II (a), first paragraph, and Section 10 (a), which read as follows:

Section 4–II (a) (first paragraph):

> All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

Section 10 (a):

> The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission* or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

STATEMENT

On July 15, 1937, the National Bituminous Coal Commission issued its Order No. 15, requiring all producers of coal to file complete reports showing their total costs of production, pursuant to the authority conferred by Section 10 (a) of the Act. The Order contained a provision that—

> The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order and further

> gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

Copies of this Order and of cost forms 1 and 1A were mailed by the Commission to each known producer within the United States (see Order No. 15, paragraph 3). The forms sent to producers with the Order contained the following statement in bold type:

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

On March 30, 1938, the Bituminous Coal Commission issued a Ruling in which it stated that it construed Section 10 (a) of the Act as permitting the introduction in evidence at hearings before the Commission of the cost data of the individual producers and that at the price-fixing hearings subsequently to be held the aforesaid cost data would be made available for introduction in evidence. On May 11, 1938, some of the petitioners herein filed a petititon with the Commission in which they moved the Commission to vacate the Ruling of March 30, 1938, just described, and to revoke the construction of the Act contained therein. On May 25 and 26, 1938, a hearing was held, both testimony and oral argument being heard by the Commission itself. On June 1 the Commission handed down an opinion and order in which it reaffirmed its former Ruling; it decided that Section 10 (a) of the Act authorized

disclosure of the reports in hearings and that in any event such disclosure was necessary to give the parties the full and fair hearing required by the Constitution.[1]

On June 6, petitioners before the Commission filed in the United States Court of Appeals for the District of Columbia their petition to review and set aside the Commission's order of June 1, 1938, under Section 6 (b) of the Bituminous Coal Act. On August 1, the court handed down its opinion holding that the order was not thus reviewable. *Mallory Coal Company* v. *National Bituminous Coal Commission*, 99 F. (2d) 399. On August 31 the Commission entered orders that its secretary make available for inspection in the western minimum price areas beginning on September 10 and in the eastern areas on September 15 the cost reports here involved. The reports were to be available only to "interested parties who have filed appearances in this proceeding" (R. 7–8). The hearing in the western areas was scheduled to begin on September 20; no definite date was set in the eastern areas.

On September 7 petitioners herein filed in the District Court for the District of Columbia their bill of complaint praying that the disclosure of the

[1] Before the Commission petitioners contended that the Act precluded disclosure of the cost reports; various consumers, on the other hand, argued that the Commission would be proceeding unconstitutionally if it did not disclose the reports.

information pursuant to the orders described above be enjoined (R. 2). The bill prayed for temporary and permanent injunctions and a declaratory judgment (R. 14–15). On September 8 appellees filed a motion to dismiss the bill of complaint (R. 16), and with the consent of the parties that motion and the motion for a temporary injunction were argued on the same day. On September 9 the District Court entered its order dismissing the bill for failure "to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act of 1937" (R. 18–19). The Commission agreed not to disclose the data in question pending application to the Court of Appeals for an injunction pending appeal. On September 14 that Court granted such an injunction against disclosure of the data pending final determination of the appeal.

On October 3, 1938, the case was argued in the Court of Appeals. On December 5th that Court entered an order affirming the judgment below dismissing the bill. On December 10th it entered a further order denying a petition for rehearing and granting a stay pending action by this Court, conditioned "upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within ten days."

ARGUMENT

I

THE COMMISSION IS AUTHORIZED TO INTRODUCE IN EVIDENCE COST DATA REPORTED BY PRODUCERS

The primary question raised in this case would seem to be conclusively determined by the language of Section 10 (a) of the Bituminous Coal Act. That Section provides that—

> The Commission may require reports from producers * * *. No information obtained from a producer disclosing *costs of production or sales realization* shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission or any court* and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

This plainly indicates that although cost data was to be kept confidential in so far as the public is concerned, the confidential status was subject to an exception with respect to use in evidence before the Commission or in a judicial proceeding.

Appellant has suggested that the above section should be construed so as to permit the disclosure of data in proceedings directed at a particular producer, but not the general use of reports in

hearings held during the price-fixing process. The language used by Congress is perfectly plain and unambiguous; it does not contain any such limitation. On the contrary, the exception in terms applies to "any hearing before the Commission."

It is significant in this connection that the corresponding exception in Section 10 (a) of the Bituminous Coal Conservation Act of 1935 (49 Stat. 991), provided that the information filed should not be made public "except where such disclosure is warranted by a controversy with the producer over any order of the Commission * * *." This exception had the precise meaning which the appellants seek to read into the 1937 Act. When Congress broadened the exception in the 1937 Act so as to include "any hearing," it must be assumed that it intended the new statute to have a different meaning from the old.

Appellants contend that the first paragraph of Section 4–II (a) of the Act precludes the use in evidence of cost data, and that that paragraph was intended by Congress to limit Section 10 (a). Section 4–II (a) requires "code members" (not all producers) to file such "information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require." That paragraph furthermore provides that "All such records shall be held by the statistical bureau as the confidential records of the code member filing such information."

But this paragraph has no application here. It applies only to code members. Section 10 (a) authorizes the Commission to require reports from all producers, and Order No. 15 applies to all producers. The bill of complaint concedes that Order No. 15 was issued "pursuant to authority conferred * * * by Section 10 (a)" (R. 9). The pledge of confidence in the order does no more than incorporate the provisions of Section 10 (not of Section 4–II (a)). The order recites:

> *Pursuant to authority conferred by Section 10 of said Act,* the Commission orders and directs as follows:
>
> 1. That each producer of bituminous coal, *whether or not a code member* and whether or not engaged in commerce in coal which is subject to the provisions of Section 4 of said Act, shall file, in duplicate, complete reports showing the total costs of the tonnage produced * * *.
>
> The Commission directs specific attention *to the provisions of Section 10 of said Act* relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced. [Italics supplied.]

It is thus plain from the Order itself that the data was required to be furnished pursuant to Section 10 (a) of the Act and not to Section 4–II (a).

Thus, even if Sections 4–II (a) and 10 (a) be regarded as conflicting, the latter would be the section applicable to the cost data here involved. We do not believe, however, that there is any conflict between the two sections here involved. The first paragraph of Section 4–II (a) was concerned with the functioning of the statistical bureaus. The paragraph provided that the records were to be kept confidential "by the statistical bureaus." They were not to be revealed to the curious or to competitors seeking to pry into each other's affairs. There is no indication, however, that this section was intended to deal with the problem of whether the confidential nature of the records was to preclude their use in hearings before the Commission or in court. Section 4–II (a) certainly does not state in express language that the data could not be so used. Any negative inference to that effect which might arise if the statute were otherwise silent is dispelled by the specific language of Section 10 (a) permitting the use of cost data in hearings. The latter section, which applies to all producers, code members and non-code members alike, is the all-inclusive section.

The District Court, in its order dismissing the bill of complaint, correctly held that the acts sought to be enjoined were authorized by and not in violation of the statute.

If there be any doubt as to the proper construction of the Act, the Court should give great weight

to the construction adopted by the agency charged with the task of administering it. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Injunctions which will interfere with the administration of a statute should not be granted unless the conduct to be restrained is clearly arbitrary and illegal. This was the view taken by the Court of Appeals. It regarded the statute as ambiguous, holding that although it may be argued that Section 4 (a) of the Act requires the cost data be kept secret, "it may be just as persuasively argued that the provisions of Section 10 (a) permit the introduction of such material into evidence at any hearing before the Commission." Under such circumstances it was clearly correct in refusing to enjoin the Commission's action.

One factor which induced the Commission to construe the statute the way it did was the desire to avoid any question as to the constitutionality of its procedure. An administrative body should be given the benefit of all doubts when it is endeavoring to construe a law so as to give the parties concerned the fairest possible hearing.

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE COMMISSION'S DETERMINATION WAS NOT REVIEWABLE IN EQUITY; ITS DECISION DOES NOT CONFLICT WITH THAT OF THIS COURT IN *SHIELDS* v. *UTAH-IDAHO CENTRAL RAILROAD COMPANY*

The action of the Commission involved in this case relates to the introduction in evidence of ma-

terial in the possession of the Commission. In this suit petitioners are seeking to have the courts review the Commission's ruling in the middle of the administrative proceeding and to restrain the Commission from proceeding until the evidentiary question is first determined. The Court of Appeals held that such procedural matters were not reviewable in a suit for an injunction even though no other method of review was available. As the Court stated:

> To permit judicial review, either by injunction or by declaratory judgment, of every procedural, preliminary, and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies. That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances. Injury may result also from judicial determinations and from direct legislative action. "* * * the expense and annoyance of litigation is 'part of the social burden of living under government.'"

This is especially true where the injury complained of consists solely of the disclosure of information in evidence. Such injury is plainly part of the social burden of living under government.

Moreover, this case itself is a perfect example of the way in which judicial review of procedural matters affords opportunity for "constant delays" in administrative proceedings. Here, although no court has held the Commission's action improper, the Commission has already been impeded from June to December by the petitioners' attempts to have this preliminary question settled in the courts.

There is ample precedent for holding that such matters are not reviewable. Compare *United States* v. *Illinois Central R. R.*, 244 U. S. 82; *United States* v. *Los Angeles & Salt Lake R. R.*, 273 U. S. 299; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375. Although these decisions turned in part upon the meaning of the word "order" in the statute providing for judicial review, their reasoning that preliminary procedural matters cannot be reviewed by the courts if administrative actiton is to be effective is plainly applicable to the ordinary suit for injunction.

Petitioners claim that the decision below is inconsistent with that of this Court in *Shields* v. *Utah-Idaho Central Railroad Company*, October Term, 1938, No. 28, rendered on the same day. In the *Shields* case this Court held that a finding of fact by the Interstate Commerce Commission,

though not an order reviewable under the Urgent Deficiencies Act, could be judicially reviewed in an equity suit against a United States Attorney threatening criminal action on the basis of the Commission's decision. The case thus indicates that *some* determinations of the Interstate Commerce Commission, not reviewable under the Urgent Deficiencies Act, may be reviewed in an ordinary equity suit.

But in that case the Commission's determination was final; it conclusively determined whether the carrier was exempt from the Railway Labor Act or subject to its terms. No further administrative procedure was called for or possible, and no statutory plan for judicial review was available.

This case on the contrary is concerned with a ruling of the Commission relating to the admission of evidence—a preliminary procedural order, as the court below pointed out. In the *Shields* case the Court declared that, "The nature of the determination points to the propriety of judicial review," and then went on to show that the determination was an important and substantive part of the regulatory scheme. That is not true in the case at bar.

III

THE COMPLAINT DOES NOT ADEQUATELY ALLEGE IRREPARABLE INJURY

The only specific allegations of injury[2] contained in the complaint (Paragraph 15) are that disclosure of costs will cause consumers to demand lower prices, and that the high cost producers will lose business to low cost producers and have their credit standing impaired. There is no allegation that any of the petitioners are high cost producers. These allegations are purely speculative and conjectural. Obviously the cost reports of all producers are to be disclosed at the same time, not merely those of petitioners. We do not believe these allegations make a sufficient showing of irreparable injury to warrant the granting of injunctive relief.[3]

CONCLUSION

The decisions below do not conflict with the decisions of any other court or of this Court. They are correct both on the merits and on the jurisdictional question. The lack of sufficient allegations of irreparable injury might prevent this Court

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[2] The general allegations that there will be "great prejudice" and "irreparable injury" to petitioners are, of course, mere conclusions not admitted by the motion to dismiss.

[3] Although the failure of the complaint adequately to allege irreparable injury was not argued in the courts below, it is raised by respondents' motion to dismiss (Paragraphs 4 and 7).

from having to decide the other questions raised. The petition for certiorari should be denied.

If the Court should grant the petition for certiorari, the respondents respectfully request that the case be set down for argument in January. Further delay in the determination of the question here raised will seriously interfere with the work of the National Bituminous Coal Commission and greatly impair the functioning of the Bituminous Coal Act.

Respectfully submitted.

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